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May 10, 2023

Shona D. Green, Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118

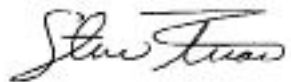
Re: D.T.C. 22-4 – CRC Communications LLC d/b/a OTELCO v. Massachusetts
Electric Company d/b/a National Grid and Verizon New England Inc.

Dear Ms. Green,

On behalf of Massachusetts Electric Company d/b/a National Grid (“National Grid” or the “Company”), enclosed is the Company’s Response to OTELCO’s Motion for Leave to File Reply and Supporting Evidentiary Materials.

Please contact me with any questions.

Very truly yours,



Steven Frias

cc: William Bendetson, Hearing Officer, Department of Telecommunications and Cable
Service List, D.T.C. 22-4

COMMONWEALTH OF MASSACHUSETTS
Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

CRC COMMUNICATIONS LLC, D/B/A)	
OTELCO)	
)	
<i>Complainant,</i>)	
)	
v.)	D.T.C. 22-4
)	
MASSACHUSETTS ELECTRIC COMPANY)	
D/B/A NATIONAL GRID AND)	
VERIZON NEW ENGLAND INC.)	
)	
<i>Respondents</i>)	
)	

**RESPONSE OF MASSACHUSETTS ELECTRIC COMPANY
D/B/A NATIONAL GRID TO OTELCO’s MOTION FOR LEAVE TO FILE A REPLY
AND EVIDENTIARY MATERIAL**

Massachusetts Electric Company d/b/a National Grid (“National Grid” or the “Company”) hereby submits its response to the Motion for Leave to File Reply (“Motion”) of CRC Communications LLC d/b/a OTELCO (“OTELCO”) filed with the Department of Telecommunications and Cable (“DTC” or “Department”) on April 18, 2023. Pursuant to the Hearing Officer’s directives, the Company’s response is limited to: (1) objections to the admission of new evidence in the proceeding, including the basis for the objection; and (2) an explanation of how this information, if admitted into evidence, should be evaluated by the DTC regarding the pole owners’ assertion that additional preconstruction surveys are needed before OTELCO’s attachment applications can proceed.

OTELCO’s most recent filing seeks to introduce new evidence to rebut a misstatement made in National Grid’s April 4, 2023 opposition to OTECLO’s Motion of February 21, 2023 that the original surveys did not include information related to side-taps, guy-wire supports,

embankments or corner poles. National Grid acknowledges that some of the Ocalc¹ reports that Osmose Utilities Services, Inc (“Osmose”) provided directly to OTELCO (the “Osmose Reports”)², indicate whether the poles have either side-taps or guy-wire supports, are situated on embankments or are corner poles. The Company’s representation to the contrary was the result of a miscommunication at National Grid and was not intended to mislead or withhold information from OTELCO or the Department. It is also important to clarify that since an Ocalc report is generated when there is a question about loading on a pole, there is not an Ocalc report for every pole surveyed. Moreover, the Company’s misstatement was made in a pleading that was filed months after the Department’s Final Order in this proceeding, which information was not directly at issue and would not have been relied upon in the Department’s final deliberations. In accordance with the Hearing Officer’s directive, National Grid hereby presents its objections to admission of the new information and its explanation of how this information, if admitted, should be evaluated by the DTC.

I. THE EVIDENTIARY RECORD SHOULD NOT BE REOPENED AFTER ISSUANCE OF A FINAL DECISION

National Grid objects to OTELCO’s request to reopen the record and submit additional evidence more than six months after issuance of the final Order in D.T.C. 22-4 (October 11, 2022) (the “Order”). In support of its motion, OTELCO cites 207 C.M.R 1.10(7) which states that for “good cause” the DTC may allow a party to file “evidentiary documents” after “completion of

¹ Ocalc is the software Osmose uses in pole loading analysis.

² OTELCO submitted with its Motion a subset of the Ocalc reports prepared by Osmose for certain poles in OTELCO’s application. As discussed herein, Osmose only prepares an Ocalc report when it identifies a potential loading issue, so an Ocalc report is not available for every pole. In fact, Osmose only generated approximately 1,000 Ocalc reports for OTELCO’s applications and those reports do not cover many of the poles designated for replacement that OTELCO wants to box.

hearing.” OTELCO has failed to show how its request meets the DTC’s³, and that of its sister agency, the Department of Public Utilities (“DPU”), stringent legal standard for admitting new evidence after the close of the record and issuance of a final order. For example, the DPU has held that good cause does not exist to reopen a record when the information at issue could have been provided during the proceeding. *See, e.g., Petition of Chicopee Municipal Lighting Plant Seeking the Right to Serve Certain Customers Within the City of Chicopee Currently Being Served by Western Massachusetts Electric Company*, D.P.U. 16-39, at 8 (motion to reopen record denied, in part, for failing to provide the information in a more timely manner and adequately explain its inability to locate and provide the data during discovery); *Fitchburg Gas and Electric Light Company*, D.P.U. 15-80-A at 8 (2016) (motion to reopen record denied when information related to capital spending based on average figures from the prior three years); *see also Fitchburg Gas and Electric Light Company*, D.P.U. 13-90-A at 13 n.10, citing D.P.U. 96-50-B (Phase I), Interlocutory Order at 8 (February 13, 1997) (information which could have been presented does not constitute “unknown or undisclosed facts”); *Massachusetts Electric Company and Nantucket Electric Company*, D.P.U. 10-54, Interlocutory Order at 22 (November 22, 2010) (motion to reopen the record denied when moving party had opportunity to provide information prior to close of record). OTELCO has not demonstrated that the information it seeks to submit at this late date would have had a material impact on the decision in D.T.C. 22-4. If this information had any relevance to the decision in D.T.C. 22-4, OTELCO has not explained why it did not request this information from Osmose when its original complaint was being adjudicated. Reopening the

³ Prior to 2007, the Department of Telecommunications and Cable (“DTE”) was the predecessor organization of the DTC, and prior to 1996, DTE was named the Department of Public Utilities (“DPU”). The DTC has ruled that it will rely on the precedent established by its predecessor agency, even though that decision was established in non-telecommunications cases. *Statewide Emergency Telecommunications Board*, D.T.C 07-07, at 7, fn. 5 (2008).

record after a final order is issued would hamper the ability of the DTC to adjudicate complaints in an orderly manner and undermine the finality of Department decisions.

OTELCO makes this request not only months after conclusion of discovery and briefing, but approximately six months after issuance of the Order. In the rare instance when the DPU has considered a motion to reopen the record after issuance of a final decision, it has required a showing that “the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision.” *Machise v. New England Telephone and Telegraph Company*, D.P.U. 87-AD-12-B at 4-7 (1990); *Boston Gas Company*, D.P.U. 88-67 (Phase II) at 7 (1989); *Tennessee Gas Pipeline Company*, D.P.U. 85-207-A at 11-12 (1986). Here, OTELCO fails to show that the Osmose Reports would have had a significant impact on the decision or on any material issue in D.T.C. 22-4. Whether National Grid’s original preconstruction surveys included information as to side-taps, or guy-wire support was not identified as an issue in OTELCO’s complaint, nor was it raised as an issue in the proceeding in D.T.C. 22-4. In fact, the content of National Grid’s original surveys, including information related to side-taps, or guy-wire support, was not raised as an issue in discovery, in briefs, or at any time prior to the issuance of the final decision in D.T.C. 22-4.

Even if the Osmose information had been in the record in D.T.C. 22-4, it would not have had a material impact on the DTC’s findings in the final decision in D.T.C. 22-4. In the Order, the DTC denied OTELCO’s “request for general boxing relief.” D.T.C. 22-4, at 23. The Osmose Reports would not have impacted that decision because, as previously stated, whether National Grid’s original preconstruction surveys included information on side-taps, guy-wire support, corner poles or poles on embankments was not before the DTC at that time. OTELCO also identified in its Complaint fourteen poles it alleged would be suitable for boxing. As discussed

below, Verizon provided specific safety, reliability and engineering reasons for rejecting several of the poles, which reasons the DTC accepted. *Id.*, at 22-23. The Osmose Reports would not have impacted that decision. In fact, had the Osmose Reports been included in the record while the proceeding was ongoing, the data would only have provided additional support for the Department's determination that the eight Verizon poles with side-taps, with guy-wires, on corners or on embankments cannot be boxed. As for the remaining poles in dispute, the DTC determined that the pole owners needed to "provide sufficient, specific reasoning to OTELCO" as "to why each pole should not be boxed for reasons of reliability, safety, or generally applicable engineering standards." *Id.*, at 14, 21. The Osmose Reports would not have caused the DTC to change its decision to "afford the pole owners the opportunity to revisit these poles" and "satisfy the Final Order's provisions." *Id.*, at 21-22. The DTC made it clear it was "not directing the pole owners to box these four poles" and emphasized that if the pole owners demonstrate specific safety, reliability, or engineering issues regarding a specific pole, they can deny OTELCO's request to box. *Id.*, at 21. The Osmose Reports would not have materially impacted the legal standard the DTC established in D.T.C. 22-4 for determining whether a pole can be boxed or its decision to give the pole owners the opportunity to revisit these poles.

In addition, if the information contained in the Osmose Reports would have had a significant bearing on a material issue in D.T.C. 22-4, OTELCO could have requested the reports from Osmose and filed them with the DTC with its initial complaint, through an amendment of the complaint, or during the discovery phase. Notably, OTELCO does not claim that it was not aware of the Reports before recently obtaining them from Osmose. The fact that OTELCO did not requisition Osmose for the data while its complaint was pending indicates that OTELCO did

not perceive that the information in these reports would have supported its request for general boxing relief, or to box the fourteen specific poles.

For the reasons set forth in Section II, *infra*, the information in the Osmose Reports supports a determination that the poles cannot be boxed, which raises the question why OTELCO is seeking to introduce the information now. The only logical conclusion is that in proffering the Osmose Reports, OTELCO is trying to get a second bite at the apple with respect to the DTC's final order in this proceeding. OTELCO has failed to demonstrate there is good cause to reopen the record in D.T.C. 22-4 to admit these reports.

This is not the first time OTELCO has attempted to introduce new evidence into the record in an untimely manner. In this proceeding, after the discovery deadline, OTELCO attempted to submit documentation into the record that Verizon had boxed a number of poles. *D.T.C. 22-4, Hearing Officer Ruling on Motion to Exclude, (9/2/2022)*, at 1. The DTC Hearing Officer rejected OTELCO's attempt to submit information into the record in untimely manner. *Id.*, at 5. The Hearing Officer noted that if the information was allowed into the record, "it could lead to unending discovery". *Id.*, at 4-5. Likewise, allowing OTELCO to submit new evidence into the record about six months after a final order was issued would undermine the orderly adjudication of complaints by the DTC and the finality of its decisions.

The Massachusetts Supreme Judicial Court has declared that the "finality of administrative decisions is a significant concern - significant to the parties, to the agency, and to the public served by the agency." *Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils.*, 461 Mass. 190, 195 (2011). In *Alliance to Protect Nantucket Sound*, the Court stated that an administrative agency "stood on firm ground in requiring demonstration of a compelling reason to reopen" the record "after the agency's final decision has issued." *Id.*, at 195. This is why Massachusetts courts

have recognized that “the power [to reopen hearings] must be sparingly used if administrative decisions are to have resolving force on which persons can rely.” *Stowe v. Bologna*, 32 Mass. App.Ct. 612, 616 (1992). Reopening the record in a proceeding in which a final order has issued should only be done sparingly, where there is a compelling reason. OTELCO has not met the high legal burden to re-open the evidentiary record.

Finally, the decisions cited by OTELCO in support of its request to reopen the evidentiary record are inapposite. OTELCO cites *CMS Generation Co.*, D.P.U. 92-166-A (1993) (OTELCO Motion for Leave, at 3-4), in which the DPU defined good cause in the context of an untimely filed Motion for Reconsideration, not a request to reopen the evidentiary record, and ultimately denied the motion. D.P.U. 92-166-A, at 1-2, 5. OTELCO also relies on *Massachusetts Electric Company*, D.P.U. 10-54-A (OTELCO’s Motion for Leave, at 4, fn. 3; OTELCO’s Reply, at 5), in which the DPU rejected a request to reopen the record made almost four months after a final order was issued. D.P.U. 10-54-A, at 14, 17. Finally, OTELCO cites *Boston Edison*, D.P.U. 97-95 (1997) (OTELCO’s Reply, at 5), in which the DPU opened a new docket to review a utility’s compliance with a prior order issued in D.P.U. 93-37 involving cross-subsidization with a non-utility subsidiary. Significantly, in that proceeding the DPU did not reopen the record of the closed docket, but opened up a new docket, D.P.U. 97-95. OTELCO has not cited any decision by the DTC, DTE or DPU where a motion to reopen the evidentiary record was permitted after a final decision was issued. In fact, the authority cited by OTELCO goes the other way. Allowing OTELCO to submit post-record evidence in a proceeding after issuance of a final decision would be contrary to the DTC’s and the DPU’s long-standing practice to prohibit post-record evidence, and would call into question the finality of DTC orders.

II. IF ALLOWED, THE NEW EVIDENCE SHOULD ONLY BE ADMITTED FOR THE LIMITED PURPOSE OF NARROWING THE SCOPE OF NEW SURVEYS TO MAKE BOXING DETERMINATIONS

If the DTC determines that the Osmose Reports should be admitted, the evidence should only be used for the limited purpose of narrowing the number of new surveys that will be necessary to determine if boxing is feasible. It is critical to note that an Ocalc report is not available for every pole in an attachment application because Osmose only performs an Ocalc analysis when it identifies a potential loading issue. In fact, for the approximately 6,500 poles covered by OTELCO's application for three towns, Osmose only generated approximately 1,000 Ocalc reports, and those reports do not cover many of the poles designated for replacement that OTELCO wants to box.⁴ Surveys will still be needed, therefore, for any pole that does not have a corresponding Ocalc report.

For those poles that do have an Ocalc report, it is also important to recognize that the purpose of the Ocalc analysis is to assess the loading on the pole; the Ocalc reports were not conducted for the purpose of determining suitability for boxing. National Grid acknowledges that some of the reports may include information that disqualifies a pole from boxing because of the existence of either side-taps or guy wire supports, or placements on corners or on embankments. Absent such information, however, the Ocalc reports do not show which poles are suitable for boxing, because they do not include sufficient information regarding other conditions on the poles that could preclude boxing. For example, it is not possible to ascertain from many of the reports whether the subject pole is located on an embankment. Some of the reports do not include

⁴ For example, the design for Application "OTELCO NORT D2_1" (under Work Order # 30555738) indicates that 23 of the 97 poles in the application require replacement to accommodate OTELCO's proposed attachment. Although Osmose produced four Ocalc reports for this application, none of the Ocalc reports were for the 23 poles designated for replacement.

photographs and do not show whether the pole at issue supports riser facilities or a cross-connect box or other equipment which may preclude boxing. Nor do the reports show whether boxing one pole may result in code violations on neighboring poles or at the mid-spans between the poles. Since the reports are based on the original surveys, they also do not show changes on the poles that may have occurred over the past 18 months.

As noted above, while National Grid regrets the confusion created by its misstatement related to whether there may be information from the original surveys related to either side-taps, guy-wire supports, corner poles, or poles on embankments, the central point of its Opposition to OTELCO's February 21, 2023 motion is still valid - that updated surveys are needed to decide whether poles designated for replacement can be boxed, and whether some poles may be disqualified due to specific safety, network-reliability, or engineering reasons specific to that pole. In the Order, the Department found that Verizon had provided safety, network-reliability, and engineering reasons for not boxing eight⁵ poles (Poles 1, 5, 6, 7, 8, 9, 11, 12, 13, and 14), due to either the presence of side-taps, guy-wire supports, the fact that a pole was a corner pole, or was on an embankment. D.T.C. 22-4 at 22. The Department confirmed that Verizon's rationale based on one or more of these four limiting factors was specific to the eight poles and was not based upon "generalized claims of safety or network reliability, or a general preference for pole replacement." *Id.* The DTC stated:

The pole owners' decision not to box was reasonable. For these poles, Verizon provides specific safety, reliability, or generally applicable engineering reasons for denying boxing. . . . Poles 1 and 8 have *sidetaps* and *guy-wire support* making bucket-truck access, which is required for boxed poles, more difficult than it is for a normal pole and less safe. Similarly, for Poles 5, 9, 13, and 14, Verizon states that the poles are *corner poles*, "guyed to help counter the resulting tension on the pole[s]." The Department agrees with Verizon that boxing would add even more tension

⁵ The Department also agreed that Verizon's decision not to box two additional poles (Poles 7 and 11) was reasonable because boxing was not needed to avoid replacing these two poles. *Id.*

on these corner poles, potentially causing the poles to flip when they are replaced. Verizon also provides a reasonable explanation for Poles 6 and 12, stating that these poles should not be boxed because of a *steep embankment* making bucket truck access more difficult and less safe. Finally, Verizon's decision not to box Poles 7 and 11 was also reasonable because boxing is not needed to avoid replacing these poles.

Id., citations omitted (emphasis added).

Accordingly, National Grid agrees that the scope of the poles to be resurveyed, for the purpose of pole-specific boxing determinations, can be narrowed to eliminate from the resurvey any poles for which the Osmose Reports show the presence of either side-taps, guy-wire supports, corner poles or poles on embankments. Avoiding resurveys of the poles identified in the Osmose Reports will be a cost savings for OTELCO. A determination that some poles cannot be boxed does not, however, obviate the need for new surveys of the other poles.

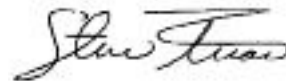
For all these reasons, National Grid requests that the DTC dismiss OTELCO's Motion. If the Department admits the Osmose Reports as evidence in the proceeding, the reports should be evaluated for the limited purpose of narrowing the scope of the poles that would need to be resurveyed to make boxing determinations.

Respectfully submitted,

Massachusetts Electric Company
d/b/a National Grid
By its attorneys,



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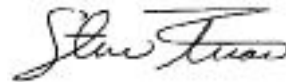
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D/B/A NATIONAL GRID AND)	
VERIZON NEW ENGLAND INC.)	
)	
<i>Respondents</i>)	
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served the foregoing documents upon the Service List for the above-captioned proceeding, in accordance with the requirements of 207 CMR 1.05.



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Dated: May 10, 2023